87-2087

No. 87-
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

****

GEORGE S. SITKA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

****

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

****

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

****

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QUESTIONS PRESENTED FOR REVIEW

I. Is the performance of the ministerial act of a Secretary of State in proclaiming ratification of an amendment to the U.S. Constitution judicially reviewable?

II. Is section 205 of the Revised Statutes of the United States unconstitutional on delegation of legislative powers grounds or on separation of powers grounds?1

1. The style of this cause contains the names of all parties to this action.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

George S. Sitka hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeals' opinion affirming the criminal conviction of Sitka was entered on April 20, 1988, and is published; See *United States v. Sitka,* 845 F.2d 43 (2nd Cir., 1988). That opinion appears in the Appendix hereto at A-1. Sitka did not move for rehearing.

The opinion of the U.S. District Court on the issue sought to be reviewed herein is published; see, *United States v. Sitka,* 666 F. Supp. 19 (D. Conn., 1987). That opinion appears in the Appendix hereto at A-11.

All errors of which Sitka complains relate solely to these orders and opinions of the District Court and Court of Appeals.

JURISDICTION

The judgment sought to be reviewed by this petition was entered in the United States Court of Appeals on April 20, 1988. No petition for rehearing was filed. The jurisdiction of this Court regarding this petition is established pursuant to Title 28, U.S. Code, section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article V, U.S. Constitution:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Section 205, Revised Statutes of 1878:

> "Sec. 205. Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate

> the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

Sixteenth Amendment:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

26 U.S.C., section 7201:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

On March 4, 1987, a federal grand jury sitting in the District of Connecticut returned a thirteen (13) count indictment against George S. Sitka. Counts 1, 2 and 3 thereof charged that Sitka committed income tax evasion, proscribed by Title 26, U.S.C., section 7201, for the years 1980, 1981 and 1982. Count 4 of the indictment charged Sitka with violating Title 42 U.S.C., section 408(d), and counts 5 through 13 charged violations of Title 18, U.S.C.,

section 641. The jurisdiction of the U.S. District Court was ostensibly obtained pursuant to Title 18 U.S.C., section 3231.

After arraignment, Sitka moved the District Court on April 6, 1987, to dismiss the counts in the indictment charging tax evasion, but the District Court denied that motion; see *United States v. Sitka,* 666 F. Supp. 19 (D. Conn. 1987). On September 22, 1987, Sitka entered a conditional plea of guilty to count 2 of the indictment (which charged tax evasion during the year 1981) and an unconditional plea to count 4 thereof. Such conditional plea reserved Sitka's right to appeal the denial of his motion which sought the dismissal of count 2. Sitka was sentenced on November 9, 1987 and commenced the service of his sentence on December 4, 1987.

I. The Parties and the Underlying Controversy.

In the indictment returned in the District Court below, the prosecution charged that Sitka had committed three (3) separate offenses proscribed by Title 26, U.S.C., section 7201 (income tax evasion). These first three counts of the indictment generally averred that Sitka failed to file income tax returns for the years 1980, 1981 and 1982, and that he committed evasion by engaging in various acts of concealment. In defense, Sitka argued that the tax evasion statute, 26 U.S.C., section 7201, and generally all the personal income tax provisions of the Internal Revenue Code of 1954 depended entirely upon the validity of the Sixteenth Amendment to the U.S. Constitution. Sitka contended that the personal income tax imposed in such Code, as well as the criminal provisions thereof, were void because the Sixteenth Amendment to the U.S. Constitution had not been lawfully ratified and made a part of the U.S. Constitution, and further that it had been fraudulently and unlawfully certified and proclaimed as ratified. For these

reasons, Sitka contended that he could not be prosecuted for alleged violations of the Internal Revenue Code.

II. Proceedings in the District Court.

On April 6, 1987, Sitka filed in the District Court a motion to dismiss the tax evasion counts in the indictment against him. In summary, Sitka specifically averred that the Congress of the United States proposed for ratification, pursuant to Article V of the U.S. Constitution, the Sixteenth Amendment thereto on July 12, 1909. Between that date and February 25, 1913, various of the legislatures of the several States took action in reference to the Congressional effort to amend the Constitution and sent documentation regarding the action taken to Secretary of State Philander C. Knox. Knox reviewed this documentation and noted various defects and other deficiencies regarding the alleged ratification by the States, but nonetheless thereafter proclaimed, pursuant to section 205 of the Revised Statutes of the United States, that the amendment had been ratified. Sitka averred in his motion that Secretary Knox had knowledge of the following described deficiencies in the ratification process:

(a) That the Kentucky State Senate voted against the ratification of the Amendment on February 8, 1910, by a vote of 9 in favor and 22 opposed;

(b) That the State of Minnesota failed to send notice of ratification to Secretary Knox as required by law;

(c) That the State of Oklahoma amended the amendment so as to make it mean almost the exact opposite of the meaning of the Sixteenth Amendment;

(d) That at least ten (10) other State legislatures engaged in the unlawful conduct of altering and changing the wording of the amendment proposed by Congress.

Sitka further averred that the above numbered States had failed to legally ratify the amendment and that this fact was known to Knox, who fraudulently and unlawfully proclaimed that the amendment had been ratified. Sitka challenged the act of Secretary Knox in proclaiming ratification on the grounds that his act was void because of the fraud involved and further Sitka attacked the constitutionality of section 205 of the Revised Statutes on the grounds that such statute constituted an unlawful delegation of legislative power to the Secretary of State and was violative of principles of separation of powers.

After arguments on Sitka's motion, the District Court ruled that, based upon prior recent decisions regarding this issue, the issue presented was solely a political question which could not be judicially resolved. However, the District Court noted that this Court had previously decided that the act of a Secretary of State in proclaiming ratification of an amendment to the U.S. Constitution was indeed a ministerial act. But, while so noting, the District Court avoided the manifold decisions of this Court which hold that the performance of a ministerial act by a public official is judicially reviewable, and simply held that Knox's performance was nonetheless non-reviewable and that section 205 of the Revised Statutes was constitutional.

Sitka ultimately entered on the day of trial a plea agreement to two counts in the indictment; that agreement reserved his right to appeal the issue presented herein.

III. Proceedings in the Court of Appeals.

Sitka's appeal to the Court of Appeals was related solely to the issues involved in the question of the alleged non-

ratification of the Sixteenth Amendment. He argued in the Court of Appeals that many state courts considered questions involving the adoption of amendments to state constitutions entirely suitable for judicial resolution. He also noted a well established line of authority wherein various state courts had voided legislative acts which had not been identically adopted by both houses of a state legislature. Using these principles of law, Sitka argued that the question of the non-ratification of the Sixteenth Amendment was entirely capable of being resolved by the judiciary. Finally, Sitka noted that this Court had held that ministerial acts performed by officials in the executive department were subject to judicial review; since the act of Secretary Knox in proclaiming ratification of the challenged amendment has been declared by this Court to be such a ministerial act, Sitka argued for that review.

The Court of Appeals, in affirming Sitka's conviction, simply followed the decision of the District Court by holding that the issue was a political one incapable of judicial review. But, in so doing, that Court likewise noted that the act challenged by Sitka, the act of Secretary Knox in proclaiming ratification of the amendment, was a ministerial act. But here the Court stopped, and refused to follow the repeated decisions of this Court commanding review of the performance of ministerial acts. This failure of the Court of Appeals to follow the decisions of this Court constitutes the primary basis for this petition.

REASONS FOR ALLOWANCE OF THE WRIT

This case is worthy of review by Writ of Certiorari for at least two primary reason: First, this Court has explicitly held that acts of public officials which are ministerial in nature are entitled to judicial review when challenged; this Court has also held that the act of proclaiming that an amendment to the U.S. Constitution has been ratified is

such a ministerial task, from which it logically follows that the judiciary should review a proclamation by a Secretary of State of ratification of an amendment. Both the District Court and Court of Appeals below acknowledged that the act in question here is a ministerial act. But, by the failure of these tribunals to engage in the required review, they have sanctioned severe departures from the precedence and decisions of this Court.

Secondly, whether section 205 of the Revised Statutes is constitutional or not presents an extremely important federal question which should be settled by this Court. Established principles of law command that this section be held unconstitutional on the grounds argued herein.

I. Although this Court has commanded review by the judiciary when the performance of a ministerial act by a public official is challenged, the Court of Appeals has sanctioned the deliberate withholding of review in this case.

Article V of the U.S. Constitution provides for amendments thereof to be proposed by Congress and ratified by three-fourths of the States; an amendment becomes valid only "when ratified" by the States. Since Article V is silent as to who or what body shall determine the occurrence of ratification of an amendment, Title 1, U.S. Code, section 106b provides that the Archivist of the United States shall make that determination. The predecessor to section 106b was section 205 of the Revised Statutes, which provided that the Secretary of State should proclaim ratification of an amendment, and section 205 was in effect in 1913, and constituted the authority by which Secretary of State Philander Knox proclaimed the ratification of the Sixteenth Amendment on February 25, 1913.

In *United States ex rel Widenmann v. Colby,* 265 F. 998 (D.C. Cir. 1920), it was held that, when the Secretary of State proclaimed ratification of an amendment pursuant

to section 205 of the Revised Statutes, he was performing a ministerial task; this Court affirmed that decision on appeal; see 257 U.S. 619, 42 S.Ct. 169 (1921). In *Ex parte Dillon,* 262 F. 563 (N.D. Cal. 1920), a similar decision was made declaring that the act of proclamation was a ministerial act. On appeal to this Court in *Dillon v. Gloss,* 256 U.S. 368, 41 S.Ct. 510 (1921), it was held that an amendment became a part of the Constitution on the date that three fourths of the States ratify the same; it was tacitly admitted that the Secretary's act was ministerial because this Court held that act immaterial. In this case, Sitka argued that Secretary Knox's act was ministerial and further that the States failed to ratify the amendment. Both the District Court and Court of Appeals found that the act performed by Knox was ministerial.

Can the judiciary of this nation review a public official's performance of a ministerial act? From the earliest days of our nation, this Court has always considered it had every right to examine and pass upon the legality of ministerial acts performed by government officials in the executive branch. Every lawyer is familiar with the constitutional principle enunciated in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), that laws which contravene the Constitution are invalid. But, *Marbury* has particular bearing upon this case in that it directly involved a Secretary of State, James Madison, and his refusal to perform a ministerial act of granting a justice of the peace commission to Marbury. In this case, this Court noticed the distinction between discretionary and ministerial acts of government officials and held that it could review the ministerial acts of public officials and force performance thereof by mandamus. In the course of the Court's opinion, it stated as follows:

> "But when the legislature proceeds to impose on that officer other duties; when he is

directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others," 5 U.S., at 166.

"If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law," 5 U.S., at 170.

"But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; .... in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department," 5 U.S., at 171.

The decision in *Marbury* marked out the plain powers of the judiciary under Article III of the Constitution to review the ministerial acts of public officials, but at the same time indicated that the courts had no power to review discretionary acts. This distinction was followed in later cases, and resulted in the Court examining ministerial acts but withholding review of discretionary acts. In *Kendall v. United States,* 37 U.S. (12 Pet.) 524 (1838), there was a dispute between a private, contract carrier of the U.S. mails and the Postmaster-General which concerned certain credits to which the carrier was entitled. The Court found that the act imposed upon the Postmaster-General was ministerial and held that a mandamus could be issued to him to compel his performance.

The case of *Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475 (1866), likewise is useful in defining the distinction made between ministerial and discretionary acts. Here the State of Mississippi sued President Andrew Johnson to enjoin his enforcement of the Civil War Reconstruction Acts. In denying the injunction, this Court held that President Johnson's acts were discretionary and not ministerial. A similar holding was made in *Hollaway v. Whiteley,* 71 U.S. (4 Wall.) 522 (1867), wherein a mandamus was sought to compel the re-issuance of a patent from the Commissioner of Patents; here, the Commissioner's act was determined to be discretionary, under the facts of the case. However, under different facts, in a subsequent case involving the Commissioner of Patents, a mandamus was held issuable to compel the performance of a ministerial act; see *Butterworth v. Hoe,* 112 U.S. 50, 5 S.Ct. 25 (1884). And in a case involving a different type of "patent", a land patent, this Court held that a mandamus could be issued to force the Secretary of the Interior to deliver this instrument; see *United States v. Schurz,* 102 U.S. 378 (1880). But, in *Brown v. Hitchcock,* 173 U.S. 473, 19 S.Ct. 485 (1899), a state's claim for a land patent to federally owned swamp lands was

held not to be subject to a mandamus action, the facts being different and involving discretionary acts. However, this case involved matters still pending before administrative officials and the Court stated that, upon conclusion of the acts of the officials, the same could be subjected to judicial scrutiny to determine if the acts conformed with the laws of the United States; 173 U.S., at 477.

There are several cases of importance which note permissible action which can be taken to prevent unauthorized administrative acts. In *Board of Liquidation v. McComb,* 92 U.S. 531 (1876), this Court stated that unlawful or unauthorized acts of public officials could plainly be subjected to injunction or mandamus; see 92 U.S. at 541. In *Noble v. Union River Logging R. Co.,* 147 U.S. 165, 13 S.Ct. 271 (1893), an act of the Secretary of the Interior in excess of his lawful authority was held subject to injunction. And in *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 23 S.Ct. 33 (1902), the Postmaster-General was enjoined from the unlawful act of intercepting the mails; here this Court determined that administrative determinations involving questions of law were definitely not conclusive upon the courts.

The whole question of the judicial right to review findings, acts and judgments of administrative officials has now been resolved by law. In the Administrative Procedure Act, 5 U.S.C., Section 701, et. seq., particularly Section 702, review is plainly granted, and hornbooks on administrative law fully cover this topic, to which reference is made. Today, even discretionary acts of public officials can be reviewed; see *Kent v. Dulles,* 357 U.S. 116, 78 S.Ct. 1113 (1958), and *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S.Ct. 814 (1971). And since the Administrative Procedure Act is presently law, this act must control the decision herein. In *Thorpe v. Housing Authority of the City of Durham,* 393 U.S. 268, 89 S.Ct. 518 (1969), this Court held:

> "The general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision," 393 U.S., at 281.

The foregoing line of authority clearly demonstrates the proposition of law which permits and even commands the American judiciary to review the performance of a ministerial task when any such act is challenged. In this case, Sitka challenged the act of Secretary Knox in proclaiming ratification of the Sixteenth Amendment and alleged that Knox had committed fraud and an illegal act in so doing. Both the District Court and the Court of Appeals correctly determined that the act in question was indeed a ministerial act; but, while going this far and correctly admitting the true nature of the act in question, they both failed to take the next logical legal step and judicially review the performance of this act. Herein constitutes the error and departure of precedence of which Sitka complains.

II. The question of the constitutionality of section 205 of the Revised Statutes presents a significant federal question of extreme importance which should be finally resolved by this Court.

In isolation, Sitka's challenge to the constitutionality of section 205 of the Revised Statutes could easily appear to be just another case among many wherein challenges are made that statutes are unconstitutional. But, Sitka contends that this question has a far broader significance beyond the immediate question presented because the underlying legal principles involved will surely have a direct bearing not only upon this case, but also future cases coming before this Court. The interest of the American legal community in the principles of delegation of legislative

powers and separation of powers was recently rekindled as a direct result of the recent decision in *Bowsher v. Synar*, ___ U.S. ___, 106 S.Ct. 3181 (1986). As a consequence, there is more litigation today than ever before which directly involves these issues. In *United States v. Arnold,* 678 F. Supp. 1463 (S.D. Cal. 1988), a challenge was successfully made to the constitutionality of the U.S. Sentencing Commission established by the Sentencing Reform Act of 1984, 28 U.S.C., sections 991, et seq. On separation of powers grounds, this case found the Commission unconstitutional. The American media also reports that a similar argument is pending before a U.S. District Court in Hartford, Connecticut. The question of the constitutionality of section 205 of the Revised Statutes involves refinements of the *Bowsher doctrines,* and forthcoming litigation involving these issues require further amplification by this Court.

The significance of the question of the constitutionality of section 205 is great regarding the issue of whether the Sixteenth Amendment was legally ratified. This section was the statutory authority for Secretary Knox to proclaim ratification of this amendment challenged by Sitka. This Court has previously held that the proclamation by a Secretary of State pursuant to section 205 that an amendment was ratified is conclusive on the American judiciary; see *Leser v. Garnett,* 258 U.S. 130, 42 S.Ct. 217 (1922). Sitka argues that the decision in *Leser* is no longer valid today as it conflicts with doctrines announced in *Bowsher.* Should section 205 be unconstitutional on either delegation of powers or separation of powers grounds, then Leser would be totally inapplicable to this question, as there would be no proclamation which would be conclusive on the courts. The courts would then find it necessary to review the process of the ratification of the Sixteenth Amendment, something which should be done at any event.

The decision in *Field v. Clark,* 143 U.S. 649, 12 S.Ct. 495 (1892), in the sole case which constitutes the authority for the decision in *Leser,* supra. In *Field,* an act of Congress was challenged as being void on the grounds that the bill adopted by Congress did not contain a certain provision or section thereof included within the enrolled bill. This Court reviewed the manner by which bills became law as well as the constitutional provisions related thereto. The Court then held that the proclamation of the presiding officers in the House and Senate that a bill was lawfully adopted was an inherent feature of the legislative process. In holding that the enrolled bill in question was the "law" notwithstanding what did not appear in the Congressional Record and other documents, it was stated as follows:

> "The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress," 143 U.S., at 672.

Thus, it is clear according to the rule in *Field,* implied if not clearly expressed, that a part of the legislative process for the enactment of ordinary legislation involves this proclamation by presiding officers that the bill was adopted. The *Field* rule declares that legislative acts are the combined and harmonious interactions of legislative bodies which ultimately end with the declaration of adoption by the presiding officers. This attestation or declaration of adoption is surely a legislative power possessed only by Congress, and Congress could not delegate this task to officers in the executive branch without offending the principle condemning delegation of legislative powers.

The analogy between the enactment of ordinary legislation and constitutional amendments is apparent. For an

ordinary act of legislation, both houses of Congress must adopt the same, identical piece of legislation. The same is true for constitutional amendments; a resolution proposing an amendment must receive the concurrence of both houses of Congress. But, for amendments, the same resolution must thereafter receive the additional concurrence of three-fourths of the States, and it is only after such ratifications can this legislative process be ended. Is it not logical that, as soon as sufficient States have ratified the amendment, it should be legislative officers who determine adoption? If Congress could not delegate to an officer in the executive branch the authority to attest the adoption of ordinary legislation, it surely cannot delegate to an executive officer the duty of attesting ratification of an amendment.

In *Dillon v. Gloss,* 256 U.S. 368, 41 S.Ct. 510 (1921), this Court determined that an amendment became a part of the constitution as soon as three-fourths of the States ratified an amendment; no consequence in this amendment process was placed upon the Secretary's proclamation of ratification pursuant to section 205. But, this position changed in some respects nine months later by this Court's decision in *Leser v. Garnett,* 258 U.S. 130, 42 S.Ct. 217 (1922), which held the Secretary's proclamation as conclusive on the courts. This decision suddenly made an inconsequential, ministerial act of great importance and on a scale equal to the attestation of legislative officers that a bill was adopted by Congress. The question naturally arises as to whether the decision in *Leser* remains valid today, especially in light of further and more recent decisions dealing with principles of delegation of powers and separations of powers.

As expressed in *Field,* supra, the declaration of the adoption of a legislative act is the exercise of legislative power. But, *Field* also holds that legislative powers cannot be delegated by Congress to any officer or body outside of

Congress; see 143 U.S., at 692. And subsequent decisions of this Court further elucidate the principle that Congress cannot delegate its legislative powers; see *Panama Refining Company v. Ryan,* 293 U.S. 388, 421, 55 S.Ct. 241 (1935); *Schecter Poultry Corp. v. United States,* 295 U.S. 495, 529, 55 S.Ct. 837 (1935); and *Carter v. Carter Coal Company,* 298 U.S. 238, 311, 56 S.Ct. 855 (1936). In light of this precedence, can the doctrine in *Leser* withstand analysis on delegation of powers grounds?

In Article V of the U.S. Constitution, an amendment becomes a part of the Constitution "when ratified" by the requisite number of States. The scheme involved in Article V envisions that Congress in most instances will propose an amendment which is subsequently submitted to the States for ratification. It must be noted that throughout this entire process, the President and his officers have no constitutional role to play in it; see *Hollingsworth v. Virginia,* 3 U.S. (3 Dall.) 378 (1798). But it also must be noted that the Constitution is silent as to who shall attest, declare or proclaim the event of ratification and whether such proclamation shall legally be conclusive on the courts. If this act is to be deemed conclusive on the courts and of the caliber of the attestation of presiding officers of both houses of Congress under the enrolled bill rule, then only Congress can so declare, this power being legislative, and Congress cannot delegate the exercise of this power to an executive branch officer. Thus, the *Leser* doctrine cannot withstand analysis on this grounds, and it totally fails to fit within and be consonant with other established principles of law.

Not only does section 205 of the Revised Statutes offend the doctrine against delegation of legislative powers, it violates principles of separation of powers. This principle was perhaps best stated in *O'Donoghue v. United States,* 289 U.S. 516, 53 S.Ct. 740 (1933), as follows:

> "The Constitution in distributing the powers of government, creates three distinct and separate departments -- the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital ...; namely, to preclude a commingling of these essentially different powers of government in the same hands," 289 U.S., at 530.

Sitka contends that section 205 commingles unconstitutionally legislative and executive powers in the hands of the Secretary of State.

As stated above, the power to determine if any given bill has been adopted by both houses of Congress is a legislative power possessed only by Congress. Suppose that the President sent one of his officers over to Congress and declared that only this officer could determine the enactment of a bill. If such a bold move were attempted, Congress undoubtedly would protest on grounds of separation of powers and this argument would clearly be upheld by the courts. Changing the facts slightly and supposing that no statute similar to section 205 of the Revised Statutes existed, suppose that the President unilaterally declared that only one of his officers could determine if a hotly contested constitutional amendment to curtail the power of the executive branch had been ratified by the States. Similarly, Congress would respond by arguing that the President had no role in the amendment process and further that his gamble for more authority violated principles of separation of powers. In this instance, the American judiciary would obviously support the position of Congress.

However, suppose a final example. Suppose during some national crisis that Congress proposed an amendment vesting greater powers regarding the internal affairs

of the States in the hands of both Congress and the executive branch. Suppose further the existence of a statute similar to section 205 of the Revised Statutes. Finally, suppose that the States were vehemently opposed to this effort to amend the Constitution in this respect, and none in fact ratified the amendment. This failure to ratify, under current holdings of the federal appellate courts, would not prevent the amendment of the Constitution. Congress could propose the amendment one morning, federal officers in all the States could thereafter send telegrams fraudulently asserting ratification by every State, and that afternoon an executive officer, such as the Secretary of State, could proclaim ratification. All the world could be aware of this fraud, but it would stand nonetheless under the present ruling by the Court of Appeals. It is through rulings such as that given by the Court of Appeals below that Article V of the Constitution has been made meaningless. Today, virtual dictatorial control over the amendment process is vested in the hands of the executive branch, a branch which neither Article V mentions and which this Court has declared has no role in the process. And what better illustration than this to clearly show the commingling of legislative and executive powers.

Section 205 of the Revised Statutes clearly violates the rationale of *Bowsher v. Synar,* ___ U.S. ___, 106 S.Ct. 3181 (1986). In that case, Congress empowered the President to sequester federal funds to prevent federal spending in excess of a certain amount allocated for the federal budgetary year. But, a Congressional officer, the Comptroller General, was given a role in this newly created executive power. Thus, the situation involved an executive power which was to an extent subjected to control by a Congressional officer. In holding this scheme unconstitutional on separation of powers grounds, the Court held:

> "In light of these precedents, we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws .... The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess," 106 S.Ct., at 3188.

If the situation had been slightly different in *Bowsher* and the question involved a Congressional power being exercised by an executive officer, this Court would have held as follows:

> "To permit the legislation of the laws to be vested in an officer answerable only to the President would, in practical terms, reserve in the President control over the legislation of the laws."

More recently, in *United States v. Arnold,* 678 F. Supp. 1463 (S.D. Cal. 1988), the Sentencing Reform Act of 1984, which provided for the creation of an apparently executive commission composed of judges, was subjected to analysis on separation of powers grounds. Finding that the Commission created to execute the laws commingled executive and judicial powers, the act was declared unconstitutional.

Analyzing section 205 under the doctrines of separations of powers leads directly to the conclusion that it is unconstitutional on this basis. In *Field v. Clark,* supra, it was shown that the final step in the legislative process of enact-

ing a bill was the declaration of adoption by the officers of both houses of Congress. The enrolled bill so signed by these officers is conclusive on the courts, and the courts are prevented from going behind the enrolled bill and examining the proceedings leading up to the adoption of the bill. In like respects, a proposal to amend the U.S. Constitution is a bill; it must be adopted not only by both houses of Congress, but also by three-fourths of the State legislatures. The courts when addressing issues of this type indicate that the entire process is political, and if indeed this is the case, then the proclamation of ratification must likewise be part of the political process. For such a proclamation to be conclusive upon the courts in the same fashion as the proclamation of adoption of any ordinary legislative act it must be performed by the political departments, i.e., Congress. But here, this "political" act having such a conclusive effect is not performed by Congress, but an officer in the executive branch. Here, there is indeed the impermissible commingling of executive and legislative powers. Thus, on this grounds, section 205 clearly violates doctrines of separation of powers.

SUMMARY

Congress proposed the Sixteenth Amendment to the U.S. Constitution in 1909; documents of that period of time seem to indicate that the purpose of that amendment was to circumvent the ruling of this Court in *Pollock v. Farmers' Loan & Trust Co.,* 157 U.S. 429, 15 S.Ct. 673, aff. reh., 158 U.S. 601, 15 S.Ct. 912 (1895). But, if that were the purpose, Congress sent no explanation as to the meaning or objective of the amendment to the State legislatures. These legislatures had before them the very profound undertaking to increase Congressional powers in some unknown manner. Being disabled from divining the intent of Congress, is it not surprising that some of these legislatures

disagreed as to the precise wording of the amendment? Is it not possible that some of these legislatures carefully built defects into the amendment process to enable a subsequent generation to complain of this Congressional power if it proved by ultimate experience to be improvident?

The law in 1913 as well as today absolutely requires that the States send some official notice to Washington, D.C., showing ratification of an amendment. It is these documents which are crucial to making the determination of ratification; it is these documents which are alleged to be conclusive upon the courts. But, Sitka charges that these notices of ratification sent to Philander Knox don't show what they are purported to show. Minnesota, if it indeed ratified, sent nothing, so how can it be conclusively presumed it did ratify? The Kentucky Senate voted against the amendment, and this is the reason that the document somehow sent to Knox is labelled solely as a "House Resolution." The Oklahoma legislature refused to give its assent to a resolution adopting this precise amendment; that legislature adopted an "amendment" requiring that federal income taxes be imposed pursuant to the regulation of apportionment. Anyone can see that the document sent to Knox from Oklahoma is the opposite in meaning from the Sixteenth Amendment. If the California legislature as a matter of fact adopted something, what it did adopt according to the document sent to Knox was meaningless. Knox contended that these four states were part of the 38 States which ratified the amendment. But, striking just these four states alone reduces the number of "ratifying" states to 34 in number, which is below the constitutional threshold.

Sitka challenged the ratification of the Sixteenth Amendment and specifically noted the above serious defects in addition to many others. Since these facts are horrible, the courts have fearfully avoided addressing the

merits of these facts. Instead, they have opted to find solace and protection behind the ruling of this Court in *Leser v. Garnett.*

Sitka has responded by challenging the validity of the *Leser* doctrine. The act of the Secretary of State is a ministerial act which has always been subject to judicial review. Both the District Court and Court of Appeals admit that the challenged act is ministerial in nature; from this conclusion alone, review should be had as requested by Sitka, but the Courts below avoided addressing this aspect of Sitka's argument. This constituted error.

The *Leser* rule elevates the Secretary's proclamation that an amendment has been ratified to an equality with that of officers of Congress declaring adoption of a law. The act of Congressional officers here noted is virtually identical in nature with that of the Secretary's proclamation. But, to make a proclamation of ratification conclusive on the courts, this act must be performed by Congressional officers. The performance of this act by executive officers violates principles against the delegation of legislative powers and offends doctrines of separations of powers. For these reasons, this writ should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant Sitka's petition and issue a Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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Petitioner, George S. Sitka

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 864 August Term, 1987

(Argued March 10, 1988 Decided April 20, 1988)

Docket No. 87-1505

UNITED STATES OF AMERICA,

Appellee,
v.

GEORGE S. SITKA,

Defendant-Appellant.

Before: MESKILL and ALTIMARI, Circuit Judges, and MISLER,
District Judge.*

Appeal from a judgment of conviction entered following the entry of a conditional guilty plea in the United States District Court for the District of Connecticut, Blumenfeld, J. Defendant-appellant George S. Sitka moved for dismissal of three counts of an indictment charging him with willful evasion of federal income taxation, in violation of 26 U.S.C. 7201. He argued that the

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* Honorable Jacob Mishler of the United States District Court for the Eastern District of New York, sitting by designation

.Sixteenth Amendment to the United States Constitution had been improperly ratified and that the district court therefore lacked jurisdiction to entertain a prosecution under the applicable provisions of Title 26 of the United States Code. The district court denied the motion and Sitka entered a conditional guilty plea, reserving the right to appeal the denial of the motion to dismiss.

Affirmed.

LOWELL H. BECRAFT, JR., Huntsville, Alabama,
for Defendant-Appellant.

BARBARA A. BAILEY, Assistant United States Attorney, District of Connecticut, Bridgeport, CT (Stanley A. Twardy, Jr., United States Attorney for the District of Connecticut, New Haven, CT, of counsel),
for Appellee.

MESKILL, Circuit Judge:

In this appeal, we are asked to address a question that we had thought was long settled. We are asked to rule that the Sixteenth Amendment to the United States Constitution, which gives Congress the "power to lay and collect taxes on incomes," was never properly ratified in accordance with Article V of the Constitution, and that federal courts therefore lack jurisdiction to entertain tax evasion prosecutions under the criminal penalty provisions of Title 26 of the United States Code. The United States District Court for the District of Connecticut, Blumenfeld,

J., held that such a claim presented a nonjusticiable political question and that the Secretary of State's certification of the valid ratification of the Sixteenth Amendment in 1913 was binding upon the courts. See *United States v. Sitka,* 666 F.Supp. 19 (D. Conn. 1987). For the following reasons, we affirm.

BACKGROUND

Defendant-appellant George S. Sitka was charged in a thirteen count indictment in 1987 with three counts of willfully attempting to evade federal taxation, in violation of 26 U.S.C. 7201 (1982); one count of fraudulently concealing information regarding his income from the Social Security Administration, in violation of 42 U.S.C. 408(d) (1982); and nine counts of conversion of government checks fraudulently obtained as disability benefits, in violation of 18 U.S.C. 641 (1982). The government alleged that Sitka had failed to file federal income tax returns for the years 1980, 1981 and 1982, despite substantial income in each of those years. The government also alleged that Sitka had fraudulently obtained disability benefits by withholding information regarding his income.

Shortly after his indictment, Sitka moved pursuant to Fed. R. Crim. P. 12 for dismissal of the three tax evasion counts, alleging that the district court lacked subject matter jurisdiction. Sitka argued that "the Congressional power to enact . . . Title 26 [of the United States Code], insofar as it relates to private individuals, is derived from the Sixteenth Amendment," and that "said Sixteenth Amendment . . . was never and has never been ratified by the requisite number of state legislatures as required by Article V of the U.S. Constitution." See App. at 9. In an accompanying memorandum, Sitka presented a lengthy description of the process leading to the ratification of the Sixteenth Amendment and of its subsequent certification

as a valid constitutional amendment in 1913 by then Secretary of State Philander C. Knox. Sitka described numerous alleged errors in the ratification process, including procedural irregularities at the state levels and certain syntactical and stylistic inconsistencies between the version of the amendment proposed by Congress and those ratified by the states. He sought the district court's permission to come forward at an evidentiary hearing with historical evidence of these alleged infirmities in order to show that the Sixteenth Amendment had been improperly ratified by the states and then fraudulently and erroneously certified by Secretary Knox. Sitka also alleged that the statute empowering the Secretary of State to certify such amendments in 1913 was an unconstitutional delegation of legislative authority and a violation of the constitutional doctrine of the separation of powers.

In a written ruling dated July 27, 1987, Judge Blumenfeld denied Sitka's motion to dismiss the tax evasion counts. Judge Blumenfeld first held that the district court would not consider the merits of the ultimate question concerning the validity of the Sixteenth Amendment. He held that the Secretary of State's certification of the amendment was binding upon the courts and that judicial examination of the validity of the amendment was, in any event, precluded by the political question doctrine. See 666 F.Supp. at 20-21. 1/ Judge Blumenfeld then held that the statute empowering the Secretary of State to certify the amendment in 1913, section 205 of the Revised Statutes of the United States, 2/ created a purely ministerial power and that it therefore was neither an unconstitutional delegation of power nor a violation of the constitutional doctrine mandating a separation of powers. See 666 F.Supp. at 21-23.

Following Judge Blumenfeld's decision, Sitka agreed to enter a conditional guilty plea to one of the tax evasion counts pursuant to Fed. R. Crim. P. 11(a)(2). Under the

terms of that plea, which was approved by the government and the district court, Sitka reserved the right to appeal the district court's denial of his motion to dismiss. Sitka also entered an unconditional plea to the count in the indictment charging him with a violation of 42 U.S.C. 408(d). The remaining charges were dismissed and this appeal followed.

DISCUSSION

The Sixteenth Amendment to the Constitution provides that:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The amendment was necessitated by the Supreme Court's decision in *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, *modified,* 158 U.S. 601 (1895), in which the Court held that income derived from real estate could not constitutionally be subject to direct taxation without apportionment. See 157 U.S. at 580-83. See also J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 183 (2d ed. 1983). Therefore, the Sixteenth Amendment, along with the pre-existing taxing power created by Article I, section 8 of the Constitution, provides Congress with the necessary authority to impose a direct, non-apportioned income tax. See *Brushaber v. Union Pacific Railroad Co.*. 240 U.S. 1, 12-19 (1916). See also *Parker v. Commissioner of Internal Revenue*, 724 F.2d 469, 471 (5th Cir. 1984).

The Sixteenth Amendment was proposed by Congress in a joint resolution passed in 1909. See S.J. Res. 40, 36 Stat. 184 (1909). The amendment was subsequently ratified by the requisite three-fourths of the states, in ac-

cordance with Article V of the Constitution, and was duly certified by proclamation of the Secretary of State on February 25, 1913. See J. Nowak, R. Rotunda & J. Young, supra, at 1268. Sitka's principal argument before the district court was that Secretary of State Knox either failed to consider or fraudulently disregarded numerous alleged infirmities in the ratification process. Sitka's arguments in this respect are largely gleaned from a book published in 1985 entitled *The Law That Never Was,* which catalogues various alleged procedural errors in the ratification of the Sixteenth Amendment. See App. at 32-33. As the Seventh Circuit has noted, however, the authors of *The Law That Never Was* "did not discover anything; they [simply] rediscovered something that Secretary Knox considered in 1913." *United States v. Thomas,* 788 F.2d 1250, 1253 (7th Cir.), *cert. denied,* 107 S.Ct. 187 (1986). Having considered the often trivial inconsistencies between the version of the Sixteenth Amendment proposed by Congress and those approved by the various states, Knox concluded that the amendment had been validly ratified. See id. See also *United States v. House,* 617 F.Supp. 237, 237-39 (W.D. Mich. 1985).

Having noted this apparent historical weakness in Sitka's argument, we choose instead to base our decision in this case on principles that preclude any judicial inquiry at this late date into the validity of the Sixteenth Amendment. In *Baker v. Carr,* 369 U.S. 186 (1962), the Supreme Court set forth the classic articulation of what has come to be known as the political question doctrine. The Court in *Baker* laid out several considerations that must influence a court in determining whether a particular issue presents a nonjusticiable political question. Among those considerations are "the impossibility of a court's undertaking independent resolution [of an issue] without expressing lack of the respect due coordinate branches of government [and any] . . . unusual need for unquestioning ad-

herence to a political decision already made." Id. at 217. Thus, "[t]he nonjusticiability of a political question is primarily a function of the [constitutional] separation of powers." Id. at 210. See also *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969). Among the issues that the Supreme Court has held nonjusticiable under the political question doctrine are those relating to the procedures employed in the ratification of constitutional amendments. See *Coleman v. Miller*, 307 U.S. 433, 450-56 (1939); id. at 456-60 (Black, J., concurring). See also *Baker*, 369 U.S. at 214-15.

Another doctrine closely related to -- if not inherent in -- the political question doctrine is the so-called "enrolled bill rule." Under this rule, "[i]f a legislative document is authenticated in regular form by the appropriate officials, the court[s] treat[] that document as properly adopted." *Thomas*, 788 F.2d at 1253 (citing *Field v. Clark*, 143 U.S. 649 (1892)). In fact, when the Supreme Court articulated the enrolled bill rule in the leading case of *Field v. Clark*, it expressly relied upon "[t]he respect due to coequal and independent departments [of government]." 143 U.S. at 672. See also *Baker*, 369 U.S. at 214-15; *United States v. Stahl*, 792 F.2d 1438, 1440 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 888 (1987). It was with these considerations in mind that the Court in 1922 extended the enrolled bill rule to questions concerning the validity of constitutional amendments. See *Leser v. Garnett*, 258 U.S. 130, 137 (1922). The Court in *Leser* held that authenticated resolutions of ratification from the state legislatures are binding upon the Secretary of State and that the Secretary of State's proclamation certifying the ratification of the amendment is in turn conclusive upon the courts. Id. See also *Stubbs v. Commissioner of Internal Revenue Service*, 797 F.2d 936, 938 (11th Cir. 1986) (per curiam); *Stahl*, 792 F.2d at 1440; *Thomas*, 788 F.2d at 1253.

In denying Sitka's motion to dismiss in the instant case, Judge Blumenfeld relied both on the specific command of the enrolled bill rule, see 666 F.Supp. at 20-21, and on the broader considerations inherent in the political question doctrine, see id. at 21. We agree that in light of the respect due coequal branches of government under both these rules of justiciability, we need not and should not undertake the inquiry urged upon us by Sitka. Such an inquiry would be particularly unwise and unnecessary now, after federal courts have upheld and relied upon the Sixteenth Amendment for more than seventy-five years. See *Stahl*, 792 F.2d at 1440-41; *United States v. Foster*, 789 F.2d 457, 462-63 (7th Cir.), *cert. denied*, 107 S.Ct. 273 (1986); *House*, 617 F.Supp. at 239-240. The Sixteenth Amendment was proposed by Congress and ratified by the states in accordance with procedures set out in Article V of the Constitution, and its ratification was then certified after careful scrutiny by a member of the executive branch acting pursuant to statutory duty. The validity of that process and of the resulting constitutional amendment are no longer open questions.

Finally, we also agree with Judge Blumenfeld that the statute authorizing the Secretary of State in 1913 to certify the ratification of the Sixteenth Amendment was neither an unconstitutional delegation of legislative authority nor a violation of the constitutional separation of powers. The authority created in the Secretary of State by section 205 of the Revised Statutes was purely ministerial; it could not and did not affect the process of ratification itself, which is self-executing upon completion. See *Dillon v. Gloss*, 256 U.S. 368, 376-77 (1921) (holding that the Eighteenth Amendment became effective upon "the date of its consummation" and not on the date of the Secretary of State's proclamation); *United States ex rel. Widenmann v. Colby*, 265 F. 988, 999-1000 (D.C. Cir. 1920) (terming the Secretary of State's power

under section 205 "purely ministerial"), *aff'd,* 257 U.S. 619 (1921). This conclusion is underscored by the fact that the comparable authority today is vested in the Archivist of the United States. See 1 U.S.C. 106b. See also note 2, supra. Thus, Congress has not improperly delegated any of its lawmaking authority. Moreover, the Secretary of State's execution of the power conferred upon him by section 205 in 1913 was entirely consistent with the constitutional separation of powers. The power of an executive branch official "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585 (1952). The ministerial power at issue here stems both from an act of Congress and from the direct command of Article II, section 3 of the Constitution and that the President, through the executive branch, "shall take care that the laws be faithfully executed."

CONCLUSION

For all of the foregoing reasons, the judgment of the district court is affirmed.

FOOTNOTES

1/Although Judge Blumenfeld's opinion alludes to a similar challenge by Sitka to the validity of the Seventeenth Amendment, which provides for direct popular election of United States Senators, see 666 F.Supp. at 20 & n.1, no such claim has been made in this appeal. Moreover, although there is one apparently erroneous reference to the Seventeenth Amendment in the record on appeal, see App. at 10, that amendment does not appear to have been relevant in any material way to the relief sought by Sitka in the district court. See id. at 8-9, 32-33.

2/Section 205, as it existed in 1913, provided that:

Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Act of April 20, 1818, ch. 30, 2, Rev. Stat. 205 (2d ed. 1878) (repealed Oct. 31, 1951; current version, as amended, at 1 U.S.C. 106b (1982 & Supp. IV 1986)). The modern counterpart of section 205 provides:

Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

1 U.S.C. 106b.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. H-87-10(MJB)

GEORGE S. SITKA :

RULING ON MOTIONS TO DISMISS

Defendant George Sitka was indicted on various counts of failure to file income tax returns, failure to disclose income to Social Security administrators, and conversion of property of the United States. In two different motions he seeks to have some or all of the counts against him dismissed on the grounds that the sixteenth and seventeenth amendments were never properly ratified.1 In briefs supporting these motions, Sitka does not dispute that the Secretary of State, pursuant to the statute in effect at the time, certified that these amendments were ratified by the requisite number of states. He argues nevertheless that this court should go behind the certifications of the Secretary of State and reexamine the basis for them. He asserts that reexamination will demonstrate that the amendments were not properly ratified and, as a result, are void.

Discussion

I. Previous Case Law

The arguments raised in defendant's motion have been previously rejected by other courts. The certification by the Secretary of State is binding upon the courts. In the words of Judge Easterbrook:

If a legislative document is authenticated in regular form by the appropriate officials, the court treats that document as properly adopted. *Field v. Clark,* 143 U.S. 649, 12 S. Ct. 495, 36 L.Ed. 294 (1892). The principle is equally applicable to constitutional amendments. See *Leser v. Garnett,* 258 U.S. 130, 42 S. Ct. 217, 66 L.Ed. 505 (1922), which treats as conclusive the declaration of the Secretary of State that the nineteenth amendment had been adopted. . . . Secretary Knox declared that enough states had ratified the sixteenth amendment. The Secretary's decision is not transparently defective. We need not decide when, if ever, such a decision may be reviewed in order to know that Secretary Knox's decision is now beyond review.

United States v. Thomas, 788 F.2d 1250, 1253-54 (7th Cir.), cert. *denied,* 107 S.Ct. 187 (1986); see also *United States v. Stahl,* 792 F.2d 1438, 1439 (9th Cir. 1986), *cert. denied,* 107 S.Ct. 888 (1987). Defendant's claim that the amendments were fraudulently certified does not allow the court to adjudicate an otherwise nonjusticiable issue. The Ninth Circuit analyzed the situation in the following manner:

Since the Secretary of State proclaimed that the sixteenth amendment had been duly ratified, this assertion [that the ratifying resolutions of many states were inoperative] presents a political question under *Leser.* Stahl's suggestion of fraud on the part of the Secretary does not render the question justiciable for "[j]udicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." *Field,* 143 U.S.

at 673, 12 S. Ct. at 498. Moreover, in *Baker* [*v. Carr*, 369 U.S. 186 (1962)], the Court in discussing judicial review of the ratification process characterized the political question doctrine as "a tool for maintenance of governmental order." *Baker,* 369 U.S. at 215, 82 S. Ct. 709. Consideration of Stahl's contention, 73 years after certification of the amendment's adoption and after countless judicial applications, would promote only disorder. See *United States v. Foster*, 789 F.2d 457, 462-63 (7th Cir. 1986).

We conclude that the Secretary of State's certification under authority of Congress that the sixteenth amendment has been ratified by the requisite number of states and has become part of the Constitution is conclusive upon the courts.

Stahl, 792 F.2d at 1440-41.

The Court is inclined to follow this authority. Defendant argues, however, that the courts have not yet faced the issue of whether the Secretary of State had constitutional authority to certify that the amendments had been ratified. He asserts that the statute authorizing the Secretary of State to certify the ratification of a constitutional amendment was an unconstitutional delegation of legislative power.

II. Delegation of Power

The statute in effect at the time the sixteenth and seventeenth amendments were considered, section 205 of the Revised Statutes of the United States, provided that: Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall

forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Act of April 20, 1818, ch. 80, 2, Rev. Stat. 205 (2d ed. 1878) (amended version codified at 5 U.S.C. 160 (1940), repealed Oct. 31, 1951; current version, as amended, at 1 U.S.C. 106b). In order to decide whether this statute unconstitutionally delegated power to the Secretary of State, the court must first consider the nature of the power.

A. Nature of Secretary's Power

The power given to the Secretary of State by section 205 is not a legislative power enumerated in the Constitution. Article five, which governs the amendment process, provides in relevant part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, . . . which, . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States . . . .

Thus, Congress was only given power to propose amendments, and was not specifically give power to certify that a proposed amendment had been properly ratified.

The language of article five also demonstrates that a constitutional amendment is valid when ratified, and, as a result, that the act of certification is ministerial in nature. Ratification of a proposed amendment is "an expression of consent to the amendment." *Dyer v. Blair,* 390 F. Supp.

1291, 1307 (N.D. Ill. 1975) (Stevens, Circuit Judge, presiding over three-judge panel). Certification that a proposed amendment has been ratified by the Secretary of State, or anyone else, is not the act that makes the amendment effective. *United States ex rel. Widenmann v. Colby,* 265 F. 998 (D.C. Cir. 1920), *aff'd,* 257 U.S. 619 (1921). Instead, certification merely operates to trigger the publication process so that those interested will be informed that the proposed amendment has been ratified. See *Ex Parte Dillon*, 262 F. 563, 565 (N.D. Cal. 1920), *aff'd*, 256 U.S. 368 (1921). Since the ultimate authority to ratify lies with the states, their official declaration of ratification is conclusive on the Secretary. *Leser v. Garnett,* 258 U.S. 130, 137 (1922); *Widenmann,* 265 F. at 999. The Secretary's certification that a proposed amendment has been ratified, therefore, is ministerial in nature, not legislative. Id.2

Defendant's reliance on *Hollingsworth v. Virginia,* 3 U.S. 378 (1798), in support of his claim that the Executive Branch has nothing to do with the amendment process is misplaced. There, Justice Chase merely indicated that the President's veto power does not apply to proposed constitutional amendments. The Court did not hold, in dicta or otherwise, that the Executive Branch could not participate in the administration of a constitutional amendment after it has been ratified by the appropriate number of states.

The administrative role of the Secretary of State in the amendment process is consistent with the constitutional powers given to the Executive Branch. Article II of the Constitution provides that the Executive Branch "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, 3, cl. 4. This duty to execute the laws is a broad power not specifically limited to powers enumerated in the text of the Constitution, *Myers v. United States,* 272 U.S. 52, 118 (1926), and includes the duty to execute constitutional provisions. *In re Neagle,* 135 U.S.

1, 64-67 (1890). Thus, the Executive Branch has the duty to execute new amendments to the Constitution once they are ratified by the requisite number of state legislatures. As part of this power to execute or put into force a new amendment, the Secretary of State may certify that an amendment has been ratified and send it to the appropriate newspapers for publication.

B. Delegation of Power

Having determined that the Secretary of State is not exercising legislative power, the delegation of that power is not improper. According to the landmark case on separation of powers cited by defendant, *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952), the power of the Executive Branch "must stem either from an act of Congress or from the Constitution itself." Id. at 585. Here, the power of the Secretary of State is authorized by both.

Conclusion

In sum, this court follows the Seventh and Ninth Circuits as to the nonjusticiability of the ratification of a constitutional amendment after it has been certified by the Secretary of State.3 With respect to the new argument presented by defendant in this case, the court finds that the Secretary's power to certify the ratification of an amendment and to have the amendment published is ministerial, not legislative, and that this power is properly authorized by statute and by the Constitution.

The motions to dismiss are denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 22nd day of July, 1987.

M. Joseph Blumenfeld
Senior United States District Judge

FOOTNOTES

1The sixteenth amendment gives Congress the "power to lay and collect taxes on incomes." U.S. Const. amend. XVI. The seven-teenth amendment provides that Senators to the United States Senate be "elected by the people" of the state the Senator represents. U.S. Const. amend XVII.

2The ministerial nature of the task performed by the Secretary of State is further evidenced by the modern procedure. Presently, a ratified amendment is published at the direction of the Archivist of the United States with his certificate specifying the states which ratified the amendment and indicating that the amendment has become valid. 1 U.S.C. 106b.

3If the issue was justiciable, the court notes that some cases have held that the ratification of the sixteenth amendment was valid in spite of differences between the language used by the ratifying states and that used in the proposed amendment because those differences were not material. See, e.g., *United States v. Foster,* 789 F.2d 457, 463 (7th Cir.), *cert. denied,* 107 S.Ct. 273 (1986); *United States v. House,* 617 F. Supp. 237, 238-39 (W.D. Mich. 1985), *aff'd,* 787 F.2d 593 (1986). Since the alleged defects in the ratification of the seventeenth amendment are of a

similar nature, the same authority would support a finding that the ratification of that amendment was valid.

Moreover, some cases have held that amendments which have been recognized and acted upon for many years, such as the amendments at issue in this case, should be given presumptive validity. See, e.g., *Foster,* 789 F.2d at 462 (sixteenth amendment); *Knoblauch v. Commissioner,* 749 F.2d 200, 202 (5th Cir. 1984) (sixteenth amendment), *cert. denied,* 106 S.Ct. 95 (1985); *House,* 617 F. Supp. at 240 (sixteenth amendment); *Maryland Petition Committee v. Johnson,* 265 F. Supp. 823, 826 (D. Md. 1967) (fourteenth amendment), *aff'd,* 391 F.2d 933 (4th Cir.), *cert. denied,* 393 U.S. 835 (1968); *United States v. Gugel,* 119 F. Supp. 897, 900 (E.D. Ky. 1954) (fifteenth amendment).